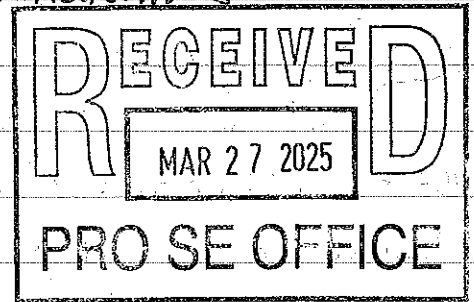


MR. ROBERT FLEMING
Attorney of Record
Founder and Director for LEGAL Literacy Advocates
Five Points Court Bldg
6600 STATE ROUTE 96
ROMULUS, N.Y. 14541



Att'n: CLERK of Court
Southern District of NEW YORK Second Circuit
DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, N.Y. 10007

Att'n: Corporation Counsel
100 Church Street
NEW YORK, N.Y. 10007

STAMPA 3/31/2025

RE: ROBERT FLEMING v. SET. STRADFORD #3420 & SET. BRADEN #9305, 10 CIV 3345

CPLR 2221(d)(e)

Motion for NEW TRIAL PURSUANT to RULE 59

II

Although Mr. Robert Fleming, Attorney of Record is highly Appreciative of Hon. Tullia Acknowledging via 1/23/2025 Notice to the Defendants of Mr. Fleming's Motion for a new trial, Mr. Fleming, however, is Appalled At how Hon. Tullia states that:

- a. The court does not require additional briefing on this motion;
- b. Defendants need not respond; and
- c. Should the court determine that additional briefing would be useful, it will promptly reach out to the parties.

Acknowledging Federal Rule of Civil Procedure 59 gives a court discretion to "grant new trial on all or some of the issues" in a case after a jury trial has been held "for any reason for which a new trial has or (may) therefore be granted in an action at law in Federal court." Fed. R. Civ. P. 59(A)(1)(A).

EXAMPLE

The court Abused its discretion when granting Defendant's Application to preclude inquiry into defendant's disciplinary histories, while knowing or should have known that:

- 1. The Bronx District Attorney's Office release of their heavily redacted list of cops who had been subjects of "adverse credibility findings," like Det's Stradford & Braccini, could not only aid with undermining (his/her) criminal prosecutions but, would have provided the jury with adequate evidence to review the allegations of official misconduct against Det's Stradford & Braccini fairly and how, why and when the civil complaints and allegations of falsification specific to them (and other officers) bore on Det's Stradford & Braccini's credibility at the trial. See: *People v. Conner*, 184 Ad3d 431 (2020); *City of New York v. City of New York*, 32 Misc2d 1246 (NY 1/13/2011). Acknowledging how, on 11/26/2014 Hon. Annalisa Torres, ruled while relying upon

Mr. Robert Fleming
Attorney of Record
Founder and Director for Legal Literacy Advocates
Five Points Corr. Fac
6600 State Route 96
Romulus, NY 14541

Att: Clerk of Court
Southern District of New York
Second Circuit
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007

Att: Corporate Counsel
100 Church Street
New York, NY 10007

2/7/2025

Re: Robert Fleming v Det. Stanford #3420 / Det. Braccini #4305 / 10-cv-3345 (RPF)

Cover Letter

Motion for New Trial

Pursuant to Rule 59; CPLR 222(d)(e)

II

Although Plaintiff, Mr. Robert FLEMING, Attorney of Record is highly appreciative for Hon. Katherine P. Hill, J., et al., informing the Defendant's of Mr. Fleming's anticipation for a rescheduled trial hearing and date, forthwith.

Mr. Fleming, Attorney of Record cautions Hon. Hill & Defendant's Representative - Corporation Counsel, primarily Mr. Daniel STARECK, who had engaged in the scheduled 2013 stipulation of settlement, for an insignificant, insulting, demeaning and lowballing offer of Two thousand five hundred (\$2,500.00) dollars, while knowing or should have known that: if a prosecutor or police, on 2/27/2009 knowingly and deliberately misleads the court or supplies false information, that on or about 2/27/1988 Plaintiff had raped, sodomized and committed a double homicide of his ex-girlfriend and her 9 year old daughter, with it previously being ruled as follows, during the 2013 pre-trial hearings:

Q. Detective, back in 2003, when the vaginal swabs came up through Cabis' matching the DNA of the defendant, how many matches were there?

A. Two.

Q. And who?

A. Once for Steven Cooper and once for Joe Little.

Q. And did you speak to anyone in the District Attorney's office about making an arrest for a sex crime?

A. Yes I did.

Q. And what, if anything, were you told?

A. I was told that the statute of limitations had already been exceeded for rape. CPL § 30.10.

Which has lead to his 17 1/2 years of unlawful and illegal imprisonment, at
 Stamford #3420 % Det. Brackner #4305 % the state is liable for malicious prosecution
 See Conkey v. State, 74 AD2d 998 (1980).
 II. Respectfully, ~~Robert Fleming~~ [Signature]

AN ANALOGOUS context of (SEE: *WEINER* v Bd. of Educ. of NEW YORK, 287 F3d 138-146 (2nd Cir. 2002)), while interpreting Plaintiff's complaint "to make the (strongest arguments) that it suggests," the court construes Plaintiff's excessive force claim AS A CAUSE OF ACTION FOR DAMAGES FOR physical injuries suffered AS A RESULT OF STRAFFORD'S ALLEGED ASSAULT. Therefore, Plaintiff's protection against suggestive (i.e. identification or interrogation) procedures encompasses not only the right to avoid methods that suggest initial identification but, AS WELL, the right to avoid, during the scheduled 1/21/2017 trial proceedings, having those suggestive methods VIT VIOLATING Plaintiff's HIPAA Rights, by permitting, aiding, abetting, encouraging and inducing an unfair environment for the disclosure of Plaintiff's medical diagnoses with Hon. KATHERINE R. PAULA to the defendant's (JESSE STRAFFORD #3420 to BRACCI #4305, et al.), knowing or should have known, THAT:

1. Finding prisoners retain A right to privacy in medical information, and that the right is "particularly strong" for HIV status. SEE: *DOE v City of New York*, 15 F3d 264-267 (2nd Cir. 1994) (i.e. "individuals who ARE infected with HIV virus clearly possess a constitutional right to privacy regarding their condition") *id.*
2. N.Y. Pub. Health Law § 2782 (McKinney 2006), state agencies authorized to obtain confidential HIV-related information should have regulations to prevent discrimination, prohibit unauthorized disclosure, and establish criteria for determining who should receive the information and when. N.Y. Pub. Health Law § 2786(2)(a) (McKinney 2006) *id.*
3. Allowing prisoner to sue law enforcement (i.e. Det. WEINER/STRAFFORD #3420) in A SEPARATE suit for damages, when he disclosed Plaintiff's HIV

medical status during the scheduled 1/21/2017 trial proceedings. SEE: *Lipinski v Shaw*, 578 F. Supp. 131 (N.D. 1999) and

4. Holding that prisoner-Plaintiff stated proper claim for relief where, how and when accusing Det. Wendell Stratford #3420 of improperly revealing his HIV-related information. SEE: *V v State*, 150 Misc2d 156, 157-58 (Cl. Cl. 1991) which, in and of themselves, Hon. Failla, et al., was transformed into a selection of ideological misconceptions that were tentative into one that is positively certain. U.S. Ct. Const. Amend. 14.

ASSESSMENT

Therefore, with Hon. Failla, et al., being considerate and thoughtful enough to make notice, how, as of 1/23/2025 Plaintiff has submitted his motion for a new trial, and how, at this time, the court does not require additional briefing on the motion, and as such, Defendants need not respond but should the court determine that additional briefing would be useful, it will promptly reach out to the parties.

Thus, while relying upon the analogous context of (SEE: *Reeherm v Kelly*, 259 F.3d 122 (2nd Cir. 7/13/2001)), and considering (all) of the state's arguments in support of Hon. Katherine P. Failla's decision for dismissing Plaintiff's plausibly submitted and presented 2010 excessive force claim against Det. Stratford #3420, along with his separate suit against Det. Wendell Stratford #3420 for damage for (his) "deliberate indifference" and "intentional misconduct" without provocation, when he disclosed Plaintiff's medical status during the scheduled 1/21/2017 trial proceedings, and having found Hon. Failla's rulings, orders and judgments without merit.

The 2018 judgement dismissing Plaintiff's appeal must be reversed, with the matter being remanded for entry of judgement granting summary judgement. A

rescheduled settlement phone conference or a new trial within 120 days. After the receipt of this motion, no more delay.

Additionally, Plaintiff seeks damages based upon claims of false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent hiring, training, supervising, detection and violation of his civil and constitutional rights by Det's Wendell Stratford #3400, Braccini #4305, individually and in their official capacities as police officers under (see: *Monell v. Dep't. of Social Services*, 98 S.Ct. 2018 (1978)) and

Respectful Superior

Under the common law municipalities may be sued directly under §1983 for constitutional deprivations inflicted upon private individuals pursuant to a governmental custom, policy, or discrete regulation or decision. See: *Batista v. Rodriguez*, 702 F.2d 393, 397 (2nd Cir. 1983) citing *Monell*, supra.

Furthermore, with respect of Plaintiff's initially belated or present claims of failure to properly hire, train and supervise defendants from 2010 thru 2017 were failed/or neglected to set forth any case law to support their contentions that Mr. Robert Fleming, attorney of record notices of claim were insufficient to put the city on notice of these claims.

The cases previously cited by the defendants were to require to specify a theory of liability pursued in the complaint. See: *Jones v. Stanick*, 2004 U.S. Dist. LEXIS 28196 (E.D.N.Y. 3/7/2004); *Mejia v. City of New York*, 119 F.Supp2d 232-255, 56 (E.D.N.Y. 2000); *Davidson v. Bronx Mun. Hospital*, 172 F.2d 59 (1949); and

Neither the record nor the law is clear enough to justify the 2017 or 2018 dismissal of

Plaintiff's excessive force claim and the affirmance of his 7/3/2013 vindictive prosecution, where the court had granted Plaintiff's motion to suppress his statement during the conclusion of the (see *People v. Huntley*, 15 NY2d 72 (1965)) on the grounds that:

1. With regard to the 2008 statement, however, the court holds that it was obtained in violation of the "indelible right to counsel" and must be suppressed.

EXAMPLE

Indelible Right to Counsel Rule

- 1A. A defendant who is in custody on "a criminal matter for which (he/she) is represented by counsel may not be interrogated in the absence of (his/her) attorney with respect to (that) matter or an unrelated matter (i.e. the rape, sodomy 1^o or murder 2^o - 2 counts) unless (he/she) waives the right to counsel in the presence of (his/her) attorney." SEE: *People v. Lopez*, 6 NY3d 375-377 (2011) citing *People v. Rogers*, 48 NY2d 167 (1979) and

Although Stradford credibly testified that he believed that defendant had already pleaded guilty and was sentenced in the unrelated drug matter, he was wrong. Defendant was in custody on an open case, he was represented by counsel on that case, and he had not yet pleaded guilty or been sentenced when he made the statement at Riker's Island on 10/23/2008, and

The court rejects the People's position that the statement should not be suppressed because defendant purportedly stated that he was representing himself during his plea allocution in the unrelated drug case. There was absolutely no evidence before (this court) to establish that counsel had been relieved on the other case and that defendant was, in fact, proceeding pro se.

In any event, despite Stradford's good faith and the absence of any evidence to suggest that he intentionally violated defendant's right to counsel, it is clear that the right to counsel (had) indelibly attached and "may"

Subsequent statement elicited in the absence of counsel "must" be suppressed. SEE *PEOPLE V GONZALES*, 75 NY2d 938-39 (1990) citing *PEOPLE V SAMUELS*, 49 NY2d 218 (1980) and

consequently, Hon. Failla % Hon. MARGARET L. CLANCY % THE DEFENDANT'S % NEW YORK COURT OF APPEALS % SECOND CIRCUIT % Appellate Division - First Department, et al.:

Deprivation of the Right to Counsel during custodial interrogation

- 2b. Broadly construing Plaintiff's present complaint, he alleges that Defendants deprived him of his inalienable right to counsel during the 10/23/2008 interrogation. SEE Am. Compl. 4; SEE ALSO, Pl. MEM. 2 ECF NO. 58.
- 3b. Plaintiff cannot, however, seek relief under § 1983 for this claim, but instead, the appropriate remedy for (his/her) claimed constitutional violation is "exclusion of the evidence following a Huntley hearing, relief which the Plaintiff has already received and which is not appropriately sought pursuant to § 1983. SEE: *BROWN V MARTIN*, 2004 WL 1774328 (2004).

Standard of Review

A. Different legal standards govern a court's review of motions to dismiss made pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6). on a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1), it is a court's duty, Hon. Failla, et al., to resolve disputed jurisdictional facts. SEE: *CAPILL INT'L. Sols. V M/T PAPER BYBERKO*, 991 F.2d 1012-19 (2nd Cir. 1983) and

b. Failure of subject matter jurisdiction (i.e. *PEOPLE V HARRIS*, 6 NY2d 9 (1983) v

(SEE: PEOPLE V LOPEZ, 16 NY2d 375 (2011)) to articulate the subject matter of how, when and why New York indelible right or Plaintiff-Appellant's 6th Amendment right to counsel had been amended or modified to detract from its precedence that:

Discussion & Conclusion of Law

AS A general rule a criminal action begins with the filing of an accusatory instrument. PEOPLE V BLAKE, 35 NY2d 331 (1974). The United States Supreme Court has held that upon the commencement of an adversarial criminal proceeding, the defendant has a constitutional right to counsel. SEE: Kirby v Illinois, 92 SCt 1877 (1972); AND

NEW YORK (City & State) has defined this right to counsel as an "indelible right" available to the defendant at any critical stage of the prosecution. PEOPLE V SETTLES, 46 NY2d 154-65 (1978); AND

The filing of an accusatory instrument also is generally held to be the point where the right to counsel attaches. SEE: PEOPLE V STROTHER, 234 AD2d 571 (2nd Sept. 1996).

HOWEVER, there ARE situations, like Plaintiff-Appellant was subjected to, during the 10/23/2008 uncounseled interrogation, where he, in the absence of counsel, was not only coerced to write an incriminating statement that was ultimately suppressed for the aforesaid reasons by which the indelible right to counsel had attached but he was also subjected to excessive force by Det. Stradford #3420 and as for Det. Braccini's #4305 part, his failure to intervene makes him liable as well. SEE: GOMEZ V Toledo, 100 SCt 1920 (1980).

Arguably, as fragmentedly presented by the defendant's, accepted by Hon. Trial and unjustifiably mischaracterized within this court's 1/20, with the trial court's 9/26/2014 belied reliance on (SEE: PEOPLE V HARTIS, 61 NY2d 9 (1983)) which (specifically) references guilty plea being intelligently and voluntarily entered

And nothing considering, referencing nor negating a defendant's 6th Amendment right to counsel, nor New York's indelible right to counsel rule (see: People v West 8 NY2d 370 (1993)) citing Blockburger v U.S., 52 Sct 180; Brown v Ohio 97 Sct 2221 (1977)), ruling that:

Although it is clear that the 6th Amendment right to counsel attaches only to charged offenses, we have recognized in other context that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In Blockburger v U.S., 52 Sct 180 (1932) we explained that where the same act or transaction constitutes a violation of (two distinct provisions) (i.e. 6th Amendment right to counsel / New York state right to indelible counsel), the test to be applied to determine whether there are two offenses or only one, is whether each provision of (two distinct provisions) requires proof of a fact which the other does not, see: Blockburger, supra; and

We have since applied the Blockburger test to delineate the scope of the 5th Amendment's Double Jeopardy clause, which prevents multiple or successive prosecutions from the same offense. Brown, supra; and

We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the 6th Amendment right to counsel attaches, unlike the trial court's 9/26/2014 / w Hon. Miller's, et al., 2/22/2018 arbitrary, capricious, illogical, irrational and biased rulings, it does encompass offenses that, even if not formally charged, would be considered under the Blockburger test.

Motion for New Trial 59

Federal Rule Civil Procedure 59 gives (A) court discretion that it may set this to grant a new trial on (all) or some of the issues (i.e. People v
IX

LOPEZ, 61 NY2d 375 (2011) v. PEOPLE v. THURIS, 61 NY2d 9 (1983)) IN THE CASE AFTER A JURY TRIAL HAS BEEN HELD "FOR ANY REASON FOR WHICH A NEW TRIAL SHOULD BE GRANTED, WHERE - WHEN - HOW AND WHY THOSE CHOICES TO THOSE FAULTS OF THE JURY KNOWINGLY MISLEAD, MISGUIDED AND ERRONEOUSLY APPLIED (SEE: PEOPLE v. THURIS, 61 NY2d 9 (1983)) TO PLAINTIFF - APPELLANT'S 1/20/2017 CIVIL CASE AND RULING, AS WELL AS TO THE TRIAL COURT'S 9/26/2014 DECISION, WHILE DENYING HIS CPLR 440.10 MOTIONS FOR WHICH A NEW TRIAL MUST HERETOFORE BEEN GRANTED IN AN ACTION AT LAW IN FEDERAL COURT. FED. R. CIV. P. 59(A) (1)(F) I.E. A COURT MAY, FOR EXAMPLE, GRANT A NEW TRIAL "IF, AS PLAINTIFF - APPELLANT HAS ILLUSTRATED A PRIMA FACIE CASE OF "SUBSTANTIAL ERRORS BEING MADE WITHIN THE 2013 PRE-TRIAL AND TRIAL COURT PROCEEDINGS TO THE 2017 SCHEDULED §1983 PRE-TRIAL AND TRIAL COURT PROCEEDINGS, WHERE SUBSTANTIAL ERRORS WERE (INDIVIDUALLY AND COLLECTIVELY) MADE IN ADMITTING OR EXCLUDING EVIDENCE AND INFORMATION, OR IN CHARGING THE JURY. IN RE VIRENDI UNIVERSITY, S.H. SEC. Litig., 765 F.Supp2d 512, 573 (SDNY 2011); GRAHAM v. CITY OF N.Y., 128 F.Supp3d 681, 709 (E.D.N.Y. 2015) "ERRONEOUS OR INADEQUATE JURY INSTRUCTIONS, DURING THE SEPARATE BUT DISTINCT CONSTITUTING 2013 AND 2017 SCHEDULED TRIAL PROCEEDINGS, MAY, AS IT DOES CONSTITUTE GROUND(S) FOR RESCHEDULED TRIAL(S) WHERE ILLUSTRATED ERRORS HAVE BEEN PROVEN TO BE PREJUDICIAL IN LIGHT OF THE CHARGE(S) AS A WHOLE. QUOTING LOPEZ v. CITY OF SYRACUSE, 670 F.3d 127, 2ND CIR. 2012).

CIVIL RIGHTS — IMMUNITY DEFENSE

IN DETERMINING WHETHER A PUBLIC OFFICIAL (I.E. DET'S STRICKLAND #3420 / O'DONOGHUE #4305) IS ENTITLED TO QUALIFIED IMMUNITY, A TWO-STEP ANALYSIS IS FOLLOWED:

FIRST: THE DEFENDANT(S) MUST PROVE THAT (HE/SHE) WAS ACTING WITHIN THE SCOPE OF (HIS/HER) DISCRETIONARY AUTHORITY AT THE TIME OF THE ALLEGEDLY ILLEGAL 10/23/2008 CONDUCT. U.S. C.A. CONST. AMEND. 14, AND 1/21/2017 TRIAL PROCEEDINGS; AND

IN ORDER FOR A RIGHT TO BE CLEARLY ESTABLISHED FOR PURPOSES OF DEFENDING CLAIM OF QUALIFIED IMMUNITY, CONTOURS OF THE RIGHT MUST BE SUFFICIENTLY CLEAR SO THAT A

X

REASONABLE OFFICIAL (i.e. Det's Stoddard #3420 & Braccini #4305) would or should know and understand that what (he/she) was doing, on 10/23/2008 clearly violated Plaintiff - Appellant's Constitutional rights. 42 U.S.C.A. § 1983 & And

where the law (6th Amendment right to counsel & New York's inalienable right to counsel rule) that the governmental officials (i.e. Det's Stoddard & Braccini) allegedly violated was clearly established, the immunity defense will fail because a reasonably competent public official should know the law governing (his/her) conduct. 42 U.S.C.A. § 1983 & And

Summarily, Hon. Katherine B. Failla & Hon. Matthew L. Cleary & Det's Stoddard #3420 & Braccini #4305, et al., stand to be employed in determining whether an act on 10/23/2008 by government officials (i.e. Det's Stoddard #3420 & Braccini #4305) was fatally arbitrary in the substantive due process context, depends upon whether the challenged 10/23/2008 act of violating the 6th Amendment / New York's inalienable right to counsel rule, occurred within the legislative or executive spheres, where executive action (i.e. immunity defense) is at issue, the cognizable level of executive abuse of power (i.e. professional courtesy) is that which shocks the conscience. U.S.C.A. Const. Amend. 14 & And

Furthermore, while the court is being constrained to review and examine Plaintiff - Appellant's § 1983 claim for excessive force during the 10/23/2008 unconsented interrogation, which contributed to his 2/27/2009 postplea re-arrest for Rape 1st, Sodomy 1st and Murder 2nd - 2 counts, and of which he has since discovered that SEC No. 00032 & Ind No. 00564/2009 do not constitute (any) crimes, fails to charge (any) crime and cannot be amended. See People v. Alvarez, 222 N.Y. 74 (1917); People v. Bromwich, 200 N.Y. 385; People v. Gevers, 196 N.Y. 364 citing People v. Trank, 88 App. Div. 294 (1903) & And while relying upon the analogous context of (see) Johnson v. Suffolk City, 2021

W/1163021 (3/26/2021) with the following facts that on 10/23/2008 during an uncounseled interrogation with Det's Stradford #3420 & Braccini #4305, upon Plaintiff-appellant refusing to answer questions, Det. Stradford #3420 assaulted him by knocking him upside the head SEVERAL times and Braccini #4305, for his part, failed to intervene, not being contradicted by citations to admissible evidence are deemed admitted. SEE: *Gianvullo v City of N.Y.*, 322 F.3d 139-40 (2nd Cir. 2003) (i.e. "if the opposing party... fails to controvert a fact set in the moving party's Rule 56 statement, the aforementioned presented 2010 facts will be deemed admitted"; and

similarly stated: Two, and only two, allegations are required to state a §1983 cause of action:

1. Plaintiff must allege that some person(s) has deprived (him/her) of federal right (i.e. 8th Amendment); and
2. Plaintiff must allege that the person(s) who has deprived (his/her) of that right acted under color of state. SEE: *Hudson v McMillan*, 112 S.Ct. 1731 (1997); and Pursuant to CPLR 1412, culpable conduct is an affirmative defense that is to be pleaded and proved by the parties (i.e. Det's Stradford #3420 & Braccini #4305) asserting such a defense, and upon Plaintiff's appropriate 2010 demand, defendants were required to particularize their affirmative defense. SEE: *Forney v Huntington Hosp.*, 134 Ad.2d 405 (1987); and

Within Plaintiff's §1983 excessive force claim, for a (i.e. new trial, or phone conference for summary judgment/or settlement) discussions, Plaintiff contends (inter alia) pursuant to the attached copy of "New York State Confidentiality Act" and N.Y. Public Health Law Article 27-F, Det. Stradford knew or should have known as a New York City Public Officer that state law prohibits (you) from making any further disclosure of his information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law; and

Any unauthorized further disclosure by Det. Stradford #3420 during the 2017 trial is a violation of state law, as it should result in a fine or jail sentence or both. SEE:

SEE: *McKinnon v Patterson*, 568 F.2d 930, 934 (1977); *Troutler v Thompson*, 662 F.Supp. 945-946 (N.D. Ill. 1987) citing *Woods v White*, 689 F.Supp. 874 (W.D. Wis. 1988) (i.e. therein it was found that the prisoner, like Mr. Robert Fleming, Attorney of Record, started a cause of action under § 1983 against Det. Stanford #3420, who had during the scheduled 1/21/2017 federal trial with a "deliberate indifference" and "intentional misconduct" without provocation disclosed to non-medical personnel and others viewing the proceedings that (he/she) had tested positive for AIDS, for which it has previously been held that Plaintiff, Mr. Robert Fleming, Attorney of Record has a constitutional right to privacy in (his/her) medical records. SEE: *Whalen v Roe*, 429 U.S. 589-598 (1977) citing *Siddell v Abbott Lab.*, 607 P.2d 924 (1980).

Accordingly, the reasoning contained within the precedents is eminently persuasive here and at this procedural point, as well as in accordance therewith. Hon. Katherine P. Failla et al., being encouraged to rule that this CPR 221(d)(e) motion for a new trial, scheduled summary judgment or settlement conference herein states a valid claim for the violation of Plaintiff's constitutional right to privacy, and such right precluded Det. Stanford #3420, on 1/21/2017 from disclosing to other non-medical personnel that he suffers from AIDS.

Clearly, the proposal of summary judgment/in settlement conference or for a new trial must make a prima facie showing of entitlement, as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case. SEE: *Sullivan*, 3 N.2d 395-404 (1957), and

Finally, in reviewing the motion papers, for which Hon. Failla et al. have made notice of, as of 1/23/2025 that while Plaintiff supports his motion with the recitations of the alleged facts within (his/her) claims for

These ~~trial~~ ^{trial}'s, ~~with~~ ^{with} and ~~partial~~ ^{partial} ~~misadvice~~ ^{misadvice} to the ~~defendants~~ ^{defendants} that: "the court does not require additional briefing on this motion, and as such, defendants need not respond," whereby with the defendants offering no contrary set of facts, and

with it being well-established that "facts appearing in Plaintiff's papers which the defendant does not controvert are deemed admitted." See: *Kucharek v. Angel Biden*, 36 NY2d 537-544; *Fifth v. State of New York*, 287 Ad2d 771 Ad2d 98 NY2d 365 (2002).

Therefore, due to the extenuating situations surrounding Plaintiff's ~~unfairly~~ ^{unfairly} supervised 1/2017 trial proceedings, where Hon. Katherine Polk ~~Phillips~~ ^{Phillips} had presided, as well as the circumstances which were permitted to occur to where Plaintiff was prevented from prosecuting his/her's undisputed and noncontroverted claims adequately, the 2017 ~~unfair~~ ^{unfair} order, ruling and judgement in favor of the defendants, must be reversed and a new trial order before a different judge, unless the defendants would rather engage in a rescheduled settlement or summary judgement video conference, like what ensued, on or about 11/23/2015 with Mr. Daniel Saravata, Asst. Corporation Counsel.

What constitutes profits of the crime

Plaintiff argues that the \$1 million demand/w interest does not constitute proceeds from the alleged 2/21/1988 crime, but rather is compensation for a separate independent tort, committed by Det. ~~Stratford~~ ^{Stratford} #3420 % Braccini #1305, of which he is the victim malicious prosecution, where he received 9/16/2014. And 11/1/2024 motions, court transcripts, rulings and exhibits proves how, why and where the Bronx District Attorney's, 42nd pct. % Cold case squad engaged in an unauthorized policy, with a "deliberate indifference" and "intentional misconduct" of knowingly and deliberately misleading the court by supplying false information (i.e. see no. 00032/2009 % and no. 00064/2009) which lead to his/her's 16 1/2 years of false imprisonment, the officers and state may both become liable for

malicious prosecutions. SEE: *Conkey v State*, 74 Ad2d 998 (1980); And

Acknowledging this court's previously ruled upon 11/26/2014 statement of how: "Since pro se civil rights complaints should be read with a generosity (Plaintiff's original) complaint must be given the benefit of incorporation (*Campanello v City of New York*, 624 F.Supp.1144 1147-1148 (S.D.N.Y. 1986)); And

Moreover, this court also considered the state court, Bronx County, misleading ruling (i.e. *People v Harris*, 61 NY2d 9 (1983)) where that court's indulgence, dealt with guilty pleas being intelligently and voluntarily entered, and noting concerning, referencing not negotiating defendant's 6th Amendment right to counsel or New York's indelible right to counsel rule (SEE: *People v Lopez*, 16 NY3d 375 (2011)); And

However, when, at the conclusion of the Huntley hearing, 15 NY2d 72 (1965) the court granted Fleming's motion to suppress his statement at trial because he was in custody on Rikers Island and represented by an attorney at the time of the interrogation. SEE: *People v Pando*, 64 Misc2d 634 (2d Dept. 5/11/1970) where the court ruled, as is applicable to plaintiff's case, in sum and substance:

1. Det's Stradford #3420 & Bertucci #4305, would be constrained to concede that they had no information or evidence and no reasonable grounds to believe that Mr. Fleming had committed any crime; and
2. They acted only on an inchoate and unparticularized suspicion or hunch, as the record shows; and
3. They would have had no right to question Mr. Fleming under these circumstances, far less confront him in custody and have him escorted for interrogation, even with his alleged consent; and

4. Relying upon the analogous context of (SEE *People v Albright*, 32 Ad2d 878 (1969)), the Appellate Division, said in its unanimous opinion, "inasmuch as Set's Stradford & Braccini had no right, initially, to interrogate plaintiff, the ensuing and search (although made presumptively with plaintiff's consent) was fatally infected and the fruits thereof should have been suppressed, and
5. To however Set's Stradford & Braccini, et al., exercises dominion and control over a person that person is in custody despite any denials by the detectives, one is set where (he/she) has been deprived of (his/her) freedom of action in ("any") significant way. So says *Miranda* (supra 86 S Ct. p. 1612 (1966))
6. In this case, there is fault to clarity, in the unlawful detention of Plaintiff-Appellant, wherein violation of the 4th Amendment, Set's Braccini & Stradford entered the compound of Rikers Island, as well as the Boston Court, etc. and continued through the facility during the time of Plaintiff's obtained coerced 10/23/2008 statement, and
- Acknowledging how, on 10/13/2008 the court is persuaded on how it is constrained (inter alia) to consider the accused mental state, on 10/23/2008 being that he had been attested for CSCS 3rd & CPLS 3rd and was an active drug user and must consider his mental condition at the time of the 10/13/2008 interrogation in determining whether there had been an effective waiver of his constitutional rights. SEE *People v Drake*, 52 AD2d 626 (1964), *People v Davis*, 23 Ad2d 963 (1965) (ie among other things, records from that court, etc. should be available which show his mental condition at that time, on 10/23/2008. It is possible that medical personnel who then attended him might cast some light upon the problem, for which the matter should be remitted to both, the Bronx Supreme Court & 2nd circuit, for a rescheduled trial, as to the effective and intelligent waiver of Plaintiff-Appellant, which is the mitigating factual issue, which pre-determines Plaintiff's excessive force claim, and This court, therefore, is constrained to acquiesce that Plaintiff's 2/27/2009 post plea attest

was, is and remains without adequate probable cause jurisdiction, nor sufficient evidence, where, during the scheduled 2013 pre-trial hearing the following information was revealed, that:

Q. Detective, back in 2003, when the physical swabs came up through copis, matching the DNA of the defendant, how many matches were there?

A. Two.

Q. And who?

A. One for select cooper and one for Joe Little.

Q. And did you speak to anyone in the District Attorney's office about making an arrest for a sex crime?

A. Yes, I did.

Q. And what, if anything, were you told?

A. I was told that the statute of limitations had already been exceeded for rape. Then, within the clerk's 27 months late reply - CP#330.30 decision, to his timely submitted CP#330.30 motion, on pg. #2, it has been belatedly revealed how, for instance, defendant incorrectly argues that the indictment number in this case was somehow improperly "merged" with an unrelated federal murder case, and

He also argues that the verdict was repugnant because he was acquitted of the rape and sodomy charges on which the felony murder charges were based.

Then, belatedly admitting, which should have been revealed to the 2013 trial jury, that: "Due to the statute of limitations, however, defendant was never charged with any rape or sodomy counts in this case." See: People v Fleming, IND NO. # 00564/2009 (10/15/2015), pg. #2.

Which does not and will not foreclose Appellate review from the Appellate Division - First Department of Southern District - 2nd circuit, that:

SCI NO. # 00032/2009, which charge the commission of a crime on 10/20/08 of which was subsequent to the finding of the same is invalidly's piling to

CHARGE A CRIME, AND CANNOT BE AMENDED; AND

IND NO. #00564/2009 WHICH CHARGE A CRIME(S) AS HAVING BEEN COMMITTED SUBSEQUENT TO THE FINDING OF THE SAME BY GRAND JURY, ON 2/15/2009, CANNOT BE REGARDED AS CHARGING ANY CRIME; AND

THE OMISSION TO CHARGE THE COMMISSION OF A CRIME, AS OF A TIME PRIOR TO THE FINDING OF AN INDICTMENT IS ONE OF SUBSTANCE, NOT OF FORM; AS SUCH, THE SCT NO. #00032/2009 & #00564/2009 CANNOT BE AMENDED BY THE COURT (SEE: PEOPLE V VAN EVERY, 222 N.Y. 74 (CT. APP. 12/14/1917)); AND

FURTHERMORE, THE GRAND JURY DID NOT CHARGE PLAINTIFF WITH THE COMMISSION OF (ANY) CRIME AT ANY TIME PRIOR TO THE FINDING OF AN INDICTMENT; AND SUCH OMISSION IS NOT ONE OF FORM BUT, OF SUBSTANCE AND THE RECORD IN THIS CASE CONTAINS SOME UNEXPLAINABLE AND CONTRADICTORY DETAILS. STILL, THE QUESTION SO FITS AS THE SUFFICIENCY OF THE INDICTMENT, THE RULINGS OF THE (I.E. CIRCUIT, WYOMING, ALABAMA, SENECA, WASHINGTON AND BRONX SUPREME & COUNTY COURTS) UPON MOTIONS MADE TO DISMISS SCT NO. #00032/2009 / W IND NO. #00564/2009, UPON DEMURS, AND ALLOWING AN AMENDMENT TO THE DKT NO. #2008BX05276 (10/3/2008), SUFFICIENTLY APPEARS TO OBLITERATE THOSE COURTS, AND NOW, THIS COURT, TO RULE UPON THE CORRECTNESS OF THE PROCEEDINGS HAD HEREIN; AND

ON 10/20/2008, THE BRONX COUNTY COURT, HOWEVER, SOUGHT BY AN AMENDMENT (I.E. SCT NO. #00032/2009) OF THE 10/3/2008 DKT NO. #2008BX05276, TO MAKE GOOD AN INVALID IND NO. #00564/2009, ON 2/15/2009 AND THUS EXERCISE THE FUNCTIONS OF THE GRAND JURY WITHOUT LEGAL PROOF THAT PLAINTIFF-APPELLANT HAD EVER COMMITTED A CRIME, OR THAT HE COMMITTED A CRIME ON 10/20/2008, 1/12/2009, OR 2/27/2009; SUCH PRACTICE CANNOT BE SUSTAINED (SEE: PEOPLE V GEYER, 196 N.Y. 364; AND WHILE RELYING UPON THE ANTILOGOUS CONTEXT OF (SEE: EX PARTE BAIN, 12 U.S. 1 (1887)), MR. FLEMING'S CASE FALLS WITHIN THE REASONING OF THE OPINION OF EX PARTE BAIN, 7 SCT 781 (1887), WHERE:

ON 10/20/2008, THE COURT SOUGHT TO AMEND DKT NO. #2008BX05276 V SCT NO. #00032/2009 AND ON 2/15/2009 IND NO. #00564/2009, AS TRUE BILLS AGAINST FLEMING; AND

this court, after previously examining these claims, is constrained to review his arguments upon demurrer by ordering SCI No. #00032/2009 and JMS No. #00564/2009 to be amended by striking out the words (i.e. Rape, Sodomy 1st and Murder 2nd - 2 counts), as this court holds these words to be surplusage.

MORE THAN FIVE YEARS AFTER MR. FLEMING WAS ATTAINED, HE PROCEEDED TO TRIAL AND WAS CONVICTED YET

WITH PLAINTIFFS - Appellate's motion for a new trial pursuant to Rule 59; CPLR 222 (d) (e), he is eligible as a caution to New York's the Bronx District Attorney's Office. All of the assigned, reassigned, standby trial Appellate, as well as the unilaterally assigned pro bono litigants, as ineffective lawyer (i.e. Allison Webster, Bonita Gelb, Michael Beatrice, David Huang, Michael S. Kluger, Robert S. Dean for Center for Appellate Litigation, Claudia Trapp, Jan Hoth, Mr. Alex Mark Zeno, Thomas Szviovics for Kaye Scholer Fierman LLP), who

knew or should have known, predicted upon the enclosed court transcripts, on 9/13/2013, pages 248 to 251, during the Singer, that they had wide hearings of the following, in sum:

THE COURT: MR. KLUGER, do you anticipate putting any witnesses on?

MR. KLUGER: I don't have any witnesses in light of the fact that I understand that the court is going to take judicial notice of the file. I don't have the indictment number --

THE COURT: WE will get it, 00032 of '09, page #248

THE COURT: People have rested on the hearing. MR. KLUGER, do you want to present any evidence by way of judicial notice or stip?

MR. KLUGER: Based on prior our conversation I think that we had and obviously, I haven't called any witnesses to prove out the fact that

MR. FLEMING WAS REPRESENTED BY COUNSEL AT THE TIME OF THE 2008 INTERVIEW, BUT I WOULD ASK THE COURT TO TAKE JUDICIAL NOTICE OF THE COURT FILE, WHICH IS INDICTMENT NUMBER --
THE COURT: 0032 OF '09.

MR. KLUGER: YES.

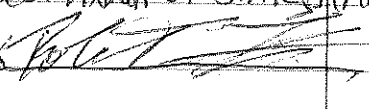
THE COURT: IT'S AN SCI NUMBER ACTUALLY, P.G. #249

MR. KLUGER: I AM ASKING THE COURT TO TAKE JUDICIAL NOTICE OF THE FACT THAT MR. FLEMING DIDN'T ACTUALLY PLEAD GUILTY TO THAT CHARGE UNTIL JANUARY 12, 2009. IT INDICATES THAT ALL OVER THE FILE. INSIDE THE FILE THERE IS SCI PAPERWORK THAT DATED JANUARY 12, 2009. IT'S INDICATED ON THE COURT JACKET, JANUARY 12, 2009, P.G. #250

THEREFORE, IT IS A WELL-SETTLED RULE OF LAW THAT THE STATUTE RESPECTING AMENDMENTS DOES NOT EXTEND TO INDICTMENTS. AND THAT A DEFECTIVE (I.E. SCI NO. #00032/2009 /O AND NO. #00564/2009) CANNOT BE AIDED BY A 7/31/2013 VERDICT OF CONVICTION, ALONG WITH THE 2017 ARBITRARY, CAPRICIOUS, ILLOGICAL AND IRRATIONAL JUDGMENT AND VERDICT IN FAVOR OF THE DEFENDANTS, IN PLAINTIFF'S EXCESSIVE FORCE CLAIM, AND

THAT HORROR, ON 9/26/2014 IN THE ERRONEOUS DECISION OF PLAINTIFF-APPELLANT'S CP#5440.10 MOTION, NOT RELIED UPON THE INACCURATE APPLICATION OF (SEE: PEOPLE V HARRIS, 61 N2d 9 (1983)) WHICH DEALS WITH A PRIOR GUILTY PLEA BEING VOLUNTARILY AND KNOWINGLY AND THAT EACH PRIOR CONVICTION WAS UNCONSTITUTIONALLY OBTAINED.

ALL OF WHICH SURVIVES A MOTION TO DISMISS, AS THIS MOTION /O THE INITIAL 2010 MOTION CONTAINS SUFFICIENT FACTUAL MATTERS THAT STATES A CLAIM OF RELIEF THAT IS PLAUSIBLE ON ITS FACE (I.E. ASHCROFT V IYEBATH, 529 S.Ct 1937 (2009)), WHERE FACTS APPEARING IN PLAINTIFF'S PAPERS WHICH THE DEFENDANT'S DOES NOT, FOR APPROXIMATELY 15 YEARS DOES NOT AND HAS NOT CONTESTED, MAY BE DEEMED ADMITTED. (SEE: AMT OR STATE, 31 MISC2D 120 (1981))

Respectfully Submitted, 
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